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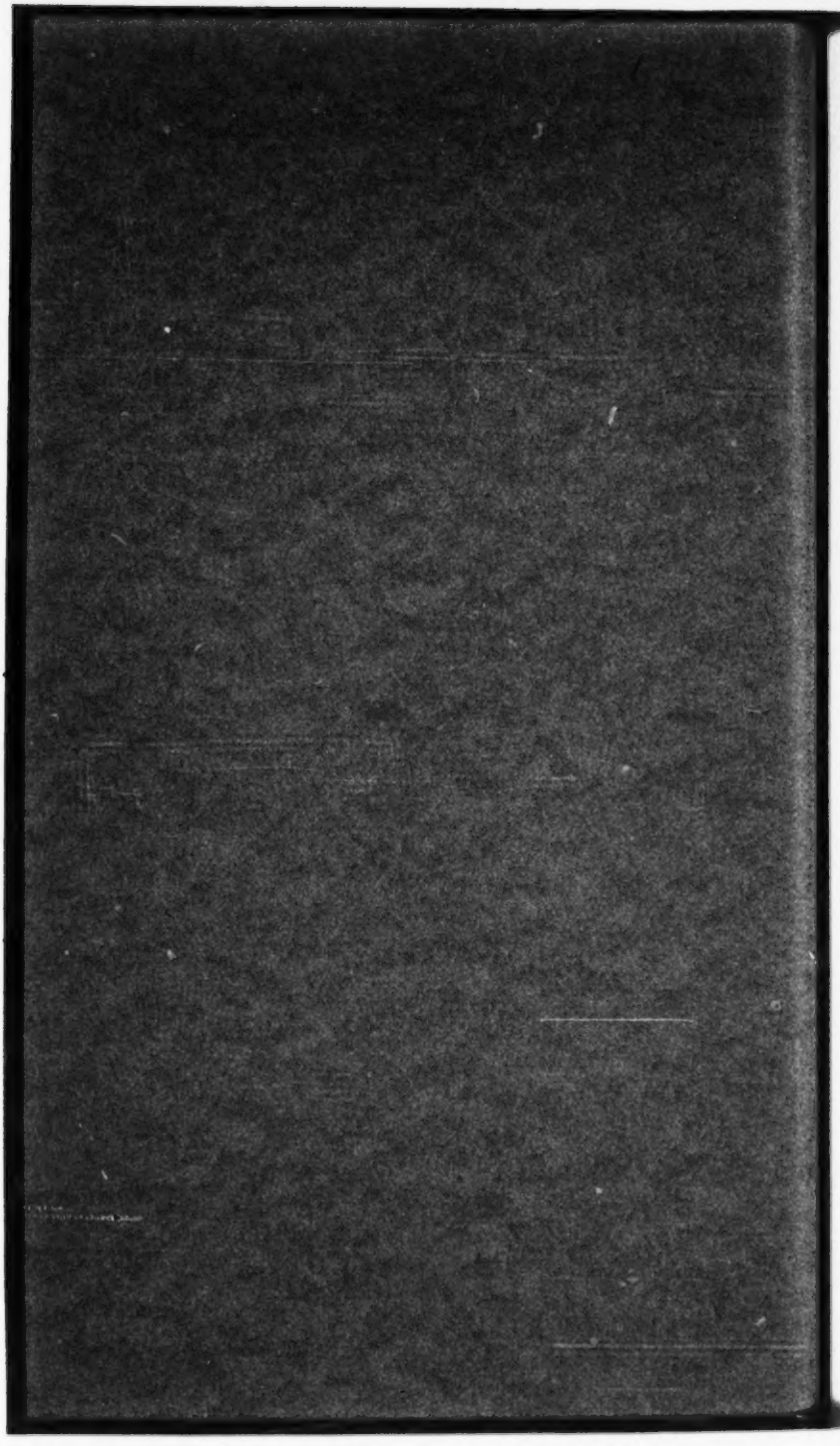

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In the

Supreme Court of the United States

No. .....

FRANK BRUCE RISING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Supreme Court of the United States:

Now comes Frank Bruce Rising, hereinafter called petitioner and applies for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, to review a judgment entered in said cause on June 12, 1952, affirming a judgment against petitioner entered in the United States District Court for the Northern District of Texas, Dallas Division, on February 19, 1952, and in support thereof, respectfully represents:

STATEMENT OF THE CASE

Petitioner was charged by Indictment in one Count. It charged him with transporting a woman, Gwen Lynn Scott, in interstate commerce from Los Angeles, California, to Dallas, Texas, for the purpose of prostitution.

The case was tried to a jury on his plea of not guilty and Petitioner was found guilty and sentenced to imprisonment of 5 years and to pay a fine of $1,000.00.

Leaving Los Angeles Petitioner and the alleged victim went to Oklahoma City, in the State of Oklahoma. Oklahoma being their destination when they left Los Angeles (T. 25). From Oklahoma City then went to Lubbock, Texas (in the Lubbock Division of the Northern District of Texas) (T. 28-31). After visiting with the family of Petitioner in Lubbock, Texas, they went to Big Spring, Texas (in the Abilene Division of same District) (T. 31-32). After three days at Big Spring, Texas, they went to Odessa, Texas, in the Pecos Division of the Western District (T. 33). On August 8, 1951, they went to Lovington, New Mexico, where the Petitioner and the alleged victim were married (T. 24, 25, 63). A residence had been established by the alleged victim in Odessa, Texas (T. 65). After their marriage they drove back to Odessa, Texas (T. 35). Thereafter Petitioner came to Dallas, Texas, from Odessa, for the purpose of trading automobiles and the alleged victim, who had married him in the meantime accompanied him (T. 36, 61, 82). The interstate character of their travels ceased long before they decided to come to Dallas, Texas

(in the Division and District where the trial took place). The trip to Dallas was in intrastate commerce.

STATEMENT AS TO JURISDICTION

Jurisdiction is invoked under Section 1254, Title 28 U. S. C. A. The opinion of the Court of Appeals was filed June 12, 1952. Petition for Rehearing was denied on July 14, 1952.

QUESTIONS PRESENTED

The opinion of the Court of Appeals was a Per Curiam Opinion and is set forth verbatim under Reference to Opinion of Court of Appeals in the Supporting Brief accompanying this petition.

The Petitioner raised in the Court of Appeals four issues which he considered fundamental to a fair and impartial trial, and that are herein presented with the earnest insistence that the Court of Appeals erred in affirming the judgment of the trial court because:

1. The insufficience of the evidence as tested by his Motion for Judgment of Acquittal (Point No. 1 in Brief in Court of Appeals).

2. The failure of the Court to instruct the jury on the law of the case (Point No. 2 in Brief in Court of Appeals).

3. In admitting in evidence illegal and highly prejudicial testimony (Point No. 3 in Brief in Court of Appeals).

4. The trial court erred in making prejudicial remarks and comments during the course of the trial thereby depriving petitioner of a fair and impartial trial (Point No. 4 in Brief in Court of Appeals).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. In the Per Curiam opinion of the Court of Appeals, 5th Circuit, in the instant case, by ignoring the trial court's failure to sustain petitioner's Motion for Judgment of Acquittal, said Per Curiam opinion is in direct conflict with the decision of the Court of Appeals, third Circuit in Gwynne v. United States, 209 Fed. 993.

2. The Court of Appeals, 5th Circuit, in its Per Curiam opinion, in the instant case, in approving the trial court's failure to instruct the jury on the law applicable to the case is in direct conflict with the decision of the Court of Appeals, 9th Circuit, in Morris v. United States, 156 Fed. 2d 525.

3. The Court of Appeals, 5th Circuit, in its Per Curiam opinion, in the instant case, in approving the admission of illegal, and highly prejudicial testimony by the trial court because of the prejudicial remarks and comments by the trial court which has so far departed from the accepted and established standards of judicial proceedings, and has sanctioned such departure by the lower court as if to require and call forth this court's power of supervision and revision to the end that uniformity of decision be obtained, and that the settled principles of prejudicial pro-

cedure long established as essential to a fair trial be not broken down.

4. The Court of Appeals in its Per Curiam opinion, in the instant case, has so far departed from the accepted and established standards for judicial proceedings and has sanctioned such departure by the lower court in not reversing the judgment of the trial court because of the admission of prejudicial remarks and comments made by the trial judge during the progress of the trial, thereby depriving petitioner of a fair and impartial trial.

CONCLUSION

The Per Curiam opinion of the Court of Appeals, 5th Circuit does not specifically discuss matters herein assigned for the allowance of the Writ of Certiorari, though such points were raised and argued before it and fully presented in the record of the case accompanying this petition. The effect of such opinion of the Court of Appeals is to sanction the rulings and action of the trial court in

(a) Refusing to sustain the Motion for Acquittal.

(b) Failure to instruct the jury on the law applicable to the case.

(c) In approving the admission in evidence of illegal and highly prejudicial testimony.

(d) In failing to reverse the case on account of the prejudicial remarks and comments by the trial judge which deprived Petitioner of a fair and impartial trial.

On these grounds it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

.....

JOE H. JONES,

.....

JAMES H. MARTIN,
1503 Dallas National Bank Building,
Dallas, Texas,
Attorneys for Petitioner.

No. .....

In the

Supreme Court of the United States

FRANK BRUCE RISING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPORTING BRIEF

To the Honorable, The Supreme Court of the United States:

REFERENCE TO OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals, 5th Circuit, in the appeal of *Frank Bruce Rising, Appellant v. United States of America, Appellee*, was rendered June 12, 1952, before Hutcheson, Russell and Strum, Circuit Judges, and reads as follows:

> "Per Curiam: Indicted for, and convicted of, a violation of Section 2421, Title 18, U. S. C., transporting a woman in interstate commerce for the purpose of

practicing prostitution, defendant has appealed. Here, putting forward four specifications of error, appellant insists that they are well taken, and, because they are, the judgment must be reversed.

"We cannot agree. Indeed, we think it plain that, varying in degree from the inexcusibly frivolous claim of point A of the first specification, that the proof fails to show that the so-called victim was a woman, to the little less frivolous one, that the woman could not, because of the claimed marriage to defendant, testify against him in the case, all of the claims of error are wanting in substance and the judgment must be affirmed.

"AFFIRMED."

JURISDICTIONAL STATEMENT

Jurisdiction is involved under Sec. 1254, Title 28, U. S. C. A. The opinion of the Court of Appeals, 5th Circuit, was filed on June 12, 1952. Petition for Rehearing was by the Court of Appeals, denied on July 14, 1952, in the opinion as stated.

STATEMENT OF THE CASE

Petitioner, a former resident of San Angelo, Texas, and whose age is 36 (R. 65) for the first time met Government witness Gwen Lynn Scott about 3 years ago (R. 14). Her maiden name was Gwen Lynn MaKeever (R. 35). In June, 1951, at Rock Island, Illinois, these parties met again (R. 14) and became intimate (R. 14). Her husband was at that time living in California working for some railroad (R. 14). It was during this time that she went to Petitioner's room several times, smoked marihuana and while engaged in acts of debauchery with Petitioner, pictures

were made of them (R. 14, 15). Prior to this intimacy with Petitioner Gwen Lynn MaKeever had met Jack Ross Scott, when she was 14 years of age, while singing with a band and they were married December 4, 1948, and were later divorced April 5, 1950 (R. 40, 41, 50). At the time of her marriage she was 18 years of age (R. 41). When she divorced him on April 5, 1950, the Decree of Divorce restored her maiden name of MaKeever (R. 52). She was born at Waterloo, Iowa, April 16, 1930 (R. 39), and graduated from high school at Davenport, Iowa (R. 40). It is contended by the Government (seriously disputed by Petitioner) a second marriage to Jack Ross Scott was celebrated in January, 1951 (R. 13, 77). On July 14 or 15 Gwen left Rock Island, Illinois, to rejoin her alleged husband Jack Ross Scott, who had an apartment at 630 West Fourth Street, Los Angeles, California (R. 17), and arrived there on the 17th day of July, 1951 (R. 59). She left California about July 31, 1951, in company with Buck McIntosh and Appellant (R. 25) destination Oklahoma. Petitioner and Buck McIntosh arrived at her apartment in California about the 27th of July, 1951, the record being silent how they knew where to find her (R. 19). From the date of their arrival to the date of the departure for Oklahoma two or three days later, the three of them indulged in a continuous round of night clubs and acts of debauchery, her husband aware that she was going out with them (R. 21) but did not know she was having an affair with Petitioner (R. 22). The day Petitioner and McIntosh arrived at her home at 630 W. 4th Street, the three of them went to a

night club, had some drinks, then went to Petitioner's hotel room, had some more drinks where both Petitioner and Buck McIntosh had sexual intercourse with her (R. 21). It was then around 4 a.m., so in order to keep her awake Petitioner gave her a little red capsule, whereupon she immediately fell asleep (R. 21, 22), and slept soundly until 8 o'clock. She then called her husband and went home (R. 22). The next evening Petitioner visited her at her apartment (R. 22). She and Petitioner went to Appellant's hotel room where she stayed until 6 o'clock the next morning before going home and during the night both Petitioner and Buck McIntosh talked to her about being a prostitute for Petitioner (R. 23), the record being silent where her husband was or what he thought of the situation. The next afternoon she told her husband that they were going to the beach, and she took her bathing suit to give verity to her statement, but instead they went to Petitioner's hotel room and engaged in sexual intercourse (R. 23). It then being late and Petitioner realizing her husband would in all probability be hungry he suggested that she drive his Cadillac to her home and prepare her husband's supper, which she did (R. 23). The three of them left the Mahan Hotel in Los Angeles, California, around 8 or 9 o'clock, about July 31, 1951, to go to the state of Oklahoma and drove to Oklahoma City (R. 26, 55) where McIntosh reported to his Parole Officer (R. 55). They left Oklahoma City the next evening and drove to Lubbock, Texas, and there visited in the home of Petitioner's brother and while there borrowed some money from his brother (R. 28-61).

While at this home Petitioner made Gwen telephone her alleged husband in California—it was Saturday, first part of August (R. 28). During this telephone conversation Petitioner disapproved some part of the conversation, slammed up the phone, pulled her from the room and into the front yard, beat her up, causing her to fall down, cutting her forehead (R. 29). The three of them left Lubbock, driving to Big Spring, Texas, stopped at the Douglas Hotel where Gwen had intercourse with the bellboy in the presence of both Petitioner and McIntosh, although she was menstruating (R. 31-32). Petitioner made a deal with the bellboy to put her to work and she made $5.00 as a prostitute (R. 32-33). She remained in the hotel at Big Spring for three days while Petitioner was in Odessa trying to get the job as head Porter at the Big New Hotel (R. 62). Petitioner came and took her to Odessa about the 8th of August, 1951 (R. 33). On August 8th, 1951, Petitioner, Buck McIntosh and Gwen left the Walker Courts at Odessa, drove to Lovington, New Mexico, where Petitioner and Gwen were married (R. 34, 35, 63), Gwen making an affidavit in the application for marriage license that she was a single person, that her name was Gwen Lynn MaKeever and that her residence was Odessa, Texas (R. 65). After the marriage they drove back home to the Walker Courts at Odessa (R. 35). The next evening at Petitioner's and McIntosh's suggestion that she go to work in a nice whore house that they knew of, she talked to the bellboy at the Modern Hotel at Odessa and it was arranged for her to commence work there as a prostitute on the 17th day of

August, 1951 (R. 35-61). While waiting until the 17th to start work at the Modern Hotel, and desiring to trade automobiles, Petitioner and his wife drove to Dallas (R. 60) and on the 11th day of August, 1951 (R. 82) checked in at the Triple R Motel (R. 35-82). No prostitution was engaged in while at Dallas, although Petitioner asked negro porters to get dates for her (R. 84) and she had sexual intercourse with a negro bellboy (R. 36-91). Her acts of intercourse were in payment for the whiskey delivered to the room by the bellboy (R. 89). Petitioner and bride drove back to Odessa, Texas, still keeping in mind the 17th day of August when she was to start work at the Modern Hotel (R. 35, 37, 61, 62). After leaving Odessa, Petitioner and Gwen drove to Lubbock, Texas, picked up some marihuana and on the 28th day of August, 1951, separated from each other at Richmond, Virginia, Gwen taking a plane for Chicago (R. 38). Although Gwen stated that the acts of sexual intercourse with negroes was a new experience to her (R. 42), she admitted knowing personally negro band leader Nat King Cole and worked at the same place he did and that she kept company with another negro musician, Barney Bergard and that her association with him precipitated a street fight with her mother who disapproved of the association (R. 42, 43). In all of her acts of debauchery and travel over the country Gwen holds herself blameless and accuses Petitioner of forcing her to do those things and to accompany him, forcing her to marry him (R. 63, 54, 65, 34) while being unable to explain why she did not leave this man.

SPECIFICATIONS OF ERROR

1. The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because the trial judge denied appellant's Motion for Judgment of Acquittal.

2. The Court of Appeals, 5th Circuit, in affirming the judgment of the trial court because it failed to instruct the jury on the law applicable to the case.

3. The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court in admitting in evidence, over petitioner's objection, illegal and highly prejudicial testimony.

4. The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because the trial court made prejudicial remarks and comments, during the course of the trial, which deprived petitioner of a fair and impartial trial.

ARGUMENT

1. The records from page 50 through 54 shows a certified copy of a divorce in which the witness Gwen Scott was divorced from Jack Scott. In this divorce decree her maiden name of Gwen Lynn MaKeever was restored to her (R. 54, bottom of first paragraph). The Record from page 64 through 67 shows a marriage between Gwen Lynn MaKeever and the Petitioner. Particular attention is directed to the affidavit at the top of page 65 where the proof shows that a residence had been established by her in Odessa, Texas.

With the record in this state a motion was made by Petitioner (R. 69) to strike all of the testimony of the witness Gwen L. Scott, prior to the 8th day of August, 1951, on the ground that on that date she became the lawful wedded wife of the Petitioner. Omit this testimony and there is no interstate transportation in the case.

Abbott on Criminal Practice 871 says that marriage and the regulation thereof is entirely a State matter and is of no concern of the national courts. When this proof was made Petitioner was entitled to have all of the acts and conduct prior to the marriage stricken from the record, including the transportation.

In *Gwynne v. U. S., 209 Fed. 993*, a case where the defendant had transported a woman from Philadelphia to Baltimore for the purpose of prostitution, and he married the woman after reaching Baltimore. The Court in that case granted defendant's motion for a new trial on the grounds that evidence of the woman pertaining to acts and conduct prior to the marriage were not admissible. The District Attorney urged that the exclusion of the wife's testimony in cases like the present will afford a means for a defendant to escape punishment by the expedient of marrying the party injured who may be in many cases the chief and only witness for the government. The Court announced that the well-settled rule of evidence founded on sound reasons of public policy cannot be set aside to meet the exigencies of cases under particular statutes. It is the duty of the Court to apply the law as it exists. We submit that the trial court should have sustained

the motion made by Petitioner as shown on page 69 of the Record. Failure to do this, then, the Court should have submitted the issue of the marriage to the jury with proper instructions as to the effect of testimony given pertaining to acts and conduct happening prior to the marriage. We say that the learned judge fell into error in the action taken, and especially in his remarks as shown on page 70 of the record, where this matter was being presented and urged.

The alleged interstate transportation must come to an end somewhere and at some time. The proof shows that it ended when the parties arrived in Odessa, Texas, and a residence was established there.

Gwen L. MaKeever made an affidavit in the application for marriage license that she was single and that her residence was Odessa, Texas. (R. 65.) The next evening she talked to a bellboy at the Modern Hotel at Odessa and it was arranged for her to commence work on the 17th day of August, 1951. (R. 35, 61.) While waiting until the 17th to start work as a prostitute at the Modern Hotel in Odessa, Texas (in the Western District of Texas), she and Petitioner drove to Dallas, Texas, to trade Petitioner's automobile. This was on August 11, 1951 (R. 82). No prostitution was engaged in while in Dallas, although Petitioner asked a negro porter to get dates for her (R. 84), and she had intercourse with a negro bellboy (R. 36-91). Petitioner and his bride drove back to the city of her residence, Odessa, still keeping in mind the date when she was to start work at the Modern Hotel on August 17, 1951 (R.

35, 37, 61, 62). This conclusively proves that the interstate character of the transportation ended at Odessa in the Western District of Texas and that the trip to Dallas was intrastate, and Petitioner's Motion for Acquittal was erroneously denied.

2. Accused is entitled to a full and complete instruction to the jury. They can receive the law from no other source. It is the function of the charge to explain and define the law which is applicable to the case. It should not leave it to conjecture, but should be a plain, precise statement of the law. Generally it is sufficient to define the offense in the terms of the statute. In this case the trial judge gave the jurors no definition of the offense whatever. It is absolutely silent in that respect. No definition is given. No explanation of the law is made.

In Holdsmith in his *History of English Law (Vol. 1, page 168)*, it is said:

> "Judges must explain the law to the jury. They must separate the rule of law from the question of fact. This produces both precision in the statement of the rules, and a clear outside judgment of the facts."

In *Morris v. U. S., 156 F. 2d 525*, Judge Stephens after quoting the above says:

> "Thus, at an early stage in legal history we find the judge duty bound in his position to give instruction on the law to the jury. He was privileged to suggest or give examples as to law. The law might be applied, but this after or in conjunction with the offense had been defined to the jury: It remained duty and privilege of the jury to apply the law."

Instructions upon the law have been repeatedly defined as statements or announcements of the rules of law to be applied by the jury to the facts found by them.

> "Where the instruction or charge of the courts is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise he should explain it in other language in order that the jury may have a clear understanding of the law before applying it to the facts."

In petitioner's case the judge did not read the statute or explain it to the jury in his own language. The jury was left in ignorance as to what statute the case was prosecuted under. They were left to their conjecture as to what constitutes the offense charged. The trial judge did not, at any time in his charge, state any proposition of law. He only stated the result of the law's application. As pointed out in *Screws v. U. S., 325 U. S. 91*, the Supreme Court held that such a charge was erroneous.

In *Morris v. U. S., supra*, the Court in condemning the charge in that case on the same point raised by petitioner said:

> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged.
>
> "The jury must not be reduced to the position of a mere ministerial agent by a direction on their very thought, thereby withholding a vital right due them. And the judge may not pass judgment on the ability of a jury to correctly act in any given situation and in his discretion limit their historic province.

"The jury is in no sense the agent of the judge. They both derive their origin from the same high source, and the judge in laying down rules to guide the jury in their deliberations, merely acts as the mouthpiece of the law for the purpose of marking out a definite and clearly ascertained path by which the ends of justice are attained.

"Thus, we see it is at least as much the right and the duty of the jury to see to it that their verdict is a proper result from the compounding of the law and fact as it is the duty of the judge. If the facts are not sufficient to support the verdict, the judge will set it aside. If there is no law supporting the judicial instruction to convict or acquit, it is the duty of the jury to acquit. It is self-evident that the jury must have the law given to it in order that it can perform its function."

It is not a question of whether guilt can be spelt out of the record in this case. The question is, does the record show that petitioner was given a fair and impartial trial. It is the pride of our American Jurisprudence, under our Constitution and laws, that a defendant in a criminal case, even though evidence points strongly toward guilt, will receive a fair and impartial trial. He will be given a jury trial in keeping with the time tested rules of Criminal Procedure and Practice. This petitioner was denied this because of the inadequacy of the Court's charge to the jury. He excepted to the charge at the time. His case ought to be reversed.

3. On page 77 of the record appears Government Exhibit No. 1. It was admitted in evidence over the objection of petitioner as not being properly authenticated (R. 74).

On page 75 of the record Government Exhibit No. 2 was offered in evidence. Petitioner objected to it upon the same ground. It was admitted against the objection.

On page 15-16 the witness Scott was permitted to testify that the defendant smoked marahuana out in California, and that he had a picture of witness Scott in the nude and she was smoking marihuana, in Galesburg or Rock Island, Illinois. In ruling on this objection (R. 16) the Court said:

> "I overrule the objection. But, I will instruct the jury that he is not being tried for dispensing marihuanna, and this evidence is admitted only for the purpose of—so far as it may reflect upon the state of the witness' mind, or her condition at the time."

On page 25 the witness Scott was permitted to testify that petitioner forced her to have sexual intercourse with a bellboy in the Mahan Hotel in California prior to the offense charged in the indictment. This was over the objection of petitioner and was admitted by the Court with the following remarks:

> "I admit it on the assumption it shows a system leading up to the final charge."

On page 38 the witness Scott was permitted to testify what a woman in Chicago had told her. That this woman told her she knew a very good detective. This was objected to and then the District Attorney withdrew the question, but the damage done petitioner was not withdrawn.

How is it relevant to any issue of transportation in interstate commerce to show appellant violated the marihuana

law in Illinois? (R. 15, 16.) What function can this testimony have except to create prejudice? It was offered and admitted in evidence for only one purpose and that was to convince the jury that petitioner was a scoundrel and to encourage the jury to look down on him with disfavor.

Proof was offered that appellant forced the witness Scott to engage in sexual intercourse with a bellboy in California (R. 25). How was this relevant to any issue in this case? It was offered and admitted for the purpose of inflaming the minds of the jurors. It was a high-handed way, sanctioned by the Court, of creating in the minds of the jury contempt towards petitioner. It made the jurors abhor and detest petitioner. It created hatred and intolerance against him. In short, it deprived petitioner of a fair and impartial trial.

Did the Illinois transaction tend to show the purpose of the transportation from Los Angeles, California, to Dallas, Texas? Did it throw any light on the issues involved or was its function solely to degrade the petitioner?

The trial court in overruling petitioner's objection stated it was admitted to show system. We think the Court's comment aggravated the injury done petitioner by this illegal evidence; and this rule extends to proof of the accusation of another crime as well as to evidence of its actual commission.

So, it can readily be seen that the testimony that petitioner had compelled the alleged victim to have sexual intercourse with a bellboy at the Mahan Hotel in California

as well as the violations of the marihuana laws in Illinois and California, all of which were prior to and had no relation or relevancy to the offense charged, was inadmissible and was highly prejudicial.

Guilt under this act turns on the purpose which motivates the transportation, not on its accomplishment. In what manner could the "smoking of marihuana" and the taking of a picture of the victim while in the nude in the State of Illinois be relevant and material? Such conduct was long prior to the offense charged. How could the victim's testimony that she was compelled by petitioner to engage in sexual intercourse with a bellboy in California be connected in anywise with the charge on trial? And how is the testimony that petitioner compelled the victim to engage in sexual intercourse with a negro bellboy in Dallas irrelevant? Surely no one can urge that such conduct was embodied in the purpose of the transportation. It had no place in the case and was highly prejudicial. Because of its admission the case must be reversed in order to insure petitioner a fair trial.

The Court committed reversible error in admitting in evidence Government Exhibit No. 1, the state of the record at the record at that time was this:

1. Gwen Lynn MaKeever had married Jack R. Scott on December 4, 1948 (R. 41).
2. Gwen Lynn Scott was divorced from Scott and her maiden name "MaKeever" restored to her (R. 53, 54).

3. Gwen Lynn MaKeever married to petitioner and she swore her name was Gwen Lynn MaKeever and that there existed no legal impediment to her marriage to petitioner. (R. 65, 66.)

While the record was in this status the Government attacked the validity of her marriage to petitioner and offered Government Exhibit No. 1 to support the attack thereon. It was not authenticated and was not admissible, according to Sec. 1739, Title 28, U. S. C. A.

When a marriage has been shown in evidence whether regular or irregular and whatever the form of proof, the law raised a strong presumption of its legality. In *Morris v. Socky, supra,* the Court said:

> "If a marriage in fact has been established, it is presumed to be regular and valid and the burden of establishing its invalidity rests upon the party who attacks it."

Thus it can be seen that the Court erred in admitting in evidence the unauthenticated certificate as shown in Government Exhibit No. 1 (R. 77). This thing of error was aggravated by the court's remarks (R. 70) on the weight of the evidence and in belittling the defense, which calls for a reversal of the case.

4. When this case was called for trial petitioner requested that his case be passed one day so that he could get a witness present. The witness was a brother of the defendant. (R. 10, 11.) It was at his brother's home petitioner and the witness, Gwen Lynn MaKeever, visited when they came to Texas from Oklahoma City. (R. 28.) While

no point was predicated on the Court's refusal to postpone the case yet, had the brother of petitioner been present he could and would have contradicted Gwen Lynn MaKeever regarding the assault she testified to on pages 28-29. He would have testified that the trip to Lubbock, Texas, was for an innocent purpose, to-wit, to borrow money—and that he loaned petitioner $500.00 at the time (R. 61). After the Court overruled petitioner's request the District Attorney in the presence of the jury panel made a highly prejudicial statement (R. 12), and petitioner excepted thereto. The Court was requested to instruct them not to consider the statement and he did so. (R. 12.) But the Court added to his instruction the following:

> "Cases of this character usually sound like something without the fragrance of roses. All women in the Courtroom may be excused unless they especially want to hear something of this sort."

The Court should have stopped when he told the jury not to consider the statement, but instead he sent to the jury box his attitude toward the petitioner. His belief in the matters. Here a man on trial for his liberty and the Judge—a learned man—tells the jury not to consider a statement which might be inflammatory, and then adds "cases like this don't smell like roses." Such a charge is unjudicial and coming from the moderator of the trial naturally would influence the triers of facts. It tipped the scales against petitioner, when the judge should have kept them in an even balance.

Then on page 43 the comment of the Judge is tantamount to pouring salt in a fresh wound. The Court, instead of "sustaining" or "overruling" the objections as they arose on page 46 made prejudicial remarks which had a tendency to belittle the defense and ridicule petitioner before the jury.

Without repeating all of the remarks and comments set forth in the statement under this point, we would direct attention to the Court's comment on the failure to testify on page 57 and the colloquy between the Court and prosecutor on page 85 with reference to petitioner's reputation in Dallas, when his reputation had not been put in issue.

Stack these comments and remarks one upon the other or consider them one at a time, and it can be readily seen that the circumstances apparently aroused the indignation of the learned Judge to an uncommon degree; and that indignation was expressed, which was not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises or with the circumspection and caution which shall characterize judicial utterance.

In *Billeci v. U. S., 184 F. 2d 402*, the Court in passing upon the question here raised said:

> "The accused has a right to a trial by the jury. That means that the guilt or innocence must be decided by the twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it."

"Sufficient unto the day is the evil thereof, and we will get to that when we get to it," saith the Court in ruling on the propriety of the cross-examination of a Government witness on page 92.

The indignation of the Judge has increased. It has now been aroused to a state of wrath. Extemporaneously, the Judge gives way to his feelings which border on anger and rage. "Sufficient unto the day is the evil thereof" says his honor, in passing on the matter before him. The best translation of this biblical quotation is "I have had enough of this evil for one day," and then he adds, "we will get to that when we get to it," meaning when petitioner comes before us for sentence we will determine the matter. At any rate, that's the record in this case. If the translation is inaccurate then such inaccuracy emphasizes the thought —that in a criminal case it should not be necessary to speculate on what was meant by the Judge at any stage of the trial. And again with all the wisdom which the Sermon on the Mount contains and without being sacrilegious, we insist that the rights of petitioner were not safeguarded in this tribunal.

CONCLUSION

An examination of the record of the proceedings in this case leaves no doubt that petitioner's trial was conducted with conspicuous laxity; prejudicial remarks and comments by the Judge, and a total failure to inform the jury on the applicable law of the case. In this state of the record it can be easily seen that the errors seriously affect the

fairness, integrity and public reputation of the judicial proceedings of the court. Petitioner's rights were not safeguarded with solicitude, and the manner in which the trial was conducted was such as to tip the scales against petitioner. For all of the grounds and reasons heretofore stated, petitioner says that his Petition for Writ of Certiorari to the Court of Appeals for the 5th Circuit to review the judgment of that court in affirming the judgment against petitioner in the United States District Court for the Northern District of Texas, Dallas Division, is well supported in law and in fact, and ought to be allowed and granted and the case reviewed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 256

FRANK BRUCE RISING, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 121-122) is reported at 197 F. 2d 335.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1952 (R. 122), and a petition for rehearing was denied on July 14, 1952 (R. 126). The petition for a writ of certiorari was filed on August 5, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge properly admitted testimony of the witness with whom petitioner had undergone a marriage ceremony known to be bigamous.

2. Whether the trial judge properly instructed the jury as to the nature of the offense of transporting a woman in interstate commerce for the purpose of prostitution.

3. Whether the trial judge properly admitted certain additional items of evidence.

4. Whether petitioner was given a fair trial.

STATUTE INVOLVED

18 U.S.C. 2421:

> Whoever knowingly transports in interstate * * * commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * *
>
> * * * * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Fifth Circuit (R. 122, 126) affirming per curiam (R. 121-122) the judgment of the District Court for the Northern District of Texas imposing a sentence of five years' imprisonment and a fine of $1,000 upon petitioner (R. 7-8), upon the verdict of the jury finding petitioner guilty as charged (R. 6), under an indictment alleging that petitioner transported one Gwen Lynn Scott from Los Angeles, California, to Dallas, Texas, for the purpose of prostitution (R. 1-2).

The Government's principal witness was Gwen Scott. She testified that she was born April 16, 1930 (R. 13, 39), that she was first married to her husband on December 4, 1948, that they were divorced on April 5, 1950, and re-married January 21, 1951, and never divorced thereafter (R. 13, 41, 73-74, 81).

In June 1951, while her husband was in California, Scott had an affair with petitioner in Illinois. One night pictures were taken of Scott in the nude in the act of smoking marihuana. (R. 14-15.)[1]

---

[1] Petitioner's objection to testimony that he furnished the marihuana was overruled, the judge instructing the jury that petitioner was not being tried for dispensing marihuana but that the evidence was admitted only as reflecting on the witness's condition at the time (R. 16).

Scott testified that, at that time, petitioner asked her to be a prostitute for him (R. 16).

In July 1951, Scott rejoined her husband in Los Angeles, California,[2] and approximately two weeks later, petitioner and one Buck McIntosh came to the Scotts' apartment in Los Angeles and Scott went out with the two in fear that they would show the pictures taken in Rock Island to her husband and others. Petitioner stated to Scott, "You will never get me in any trouble as long as I have got these pictures." Scott "had an affair" with petitioner and "he made [her] have an affair with Mr. McIntosh." (R. 17-19, 21, 22.)

On the next night, petitioner and McIntosh took Scott to the hotel, and again attempted to induce her to become a prostitute. The next day, petitioner beat Scott with his belt for keeping his car out so long, McIntosh meanwhile standing by and watching. Petitioner then told Scott she was "going to be a prostitute, you might as well make your mind up," and other language to the same effect. (R. 22-24.) At a night club the argument continued, Scott still in fear of the two. Scott induced petitioner and McIntosh to take her to her apartment and when she refused to leave there, petitioner pulled her out of the apartment, took her back to the hotel, and after they started

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[2] Petitioner's counsel objected to "all of this stuff prior to the alleged offense" and was overruled (R. 18).

drinking, forced her to have intercourse with the bellboy in the hotel. (R. 24-25, 60.)[3]

At 6:00 o'clock in the morning, petitioner and McIntosh told Scott they were leaving and that she was going with them. Petitioner beat Scott again, across the face. The three of them drove off to Oklahoma City, Scott having no extra clothes with her. There was further slapping and threatening of Scott by petitioner at a motel where they stayed en route, petitioner stating to Scott, "Your folks won't have anything to do with you when I get through with you." (R. 25-27.) They drove to the home of petitioner's brother and sister at Lubbock, Texas, petitioner warning Scott that they were to represent themselves as being married. Petitioner then forced Scott to phone her husband at Los Angeles, meanwhile holding her by the hair. When she sought to inject some word of her plight into the conversation, petitioner dragged her out of the house, threatened to kill her, and beat her until she ran back into the house to the brother and sister, bleeding from a two-inch cut in her forehead acquired in a fall. (R. 27-29).

Petitioner borrowed some money from his brother (R. 61). He and McIntosh then drove Scott

---

[3] The testimony "he made me have intercourse with the bellboy" was objected to on behalf of petitioner as having no relation to the transportation and as being inflammatory. The objection was overruled on the ground that the testimony showed "a system leading up to the final charge" (R. 25).

to Big Spring, Texas, with further threats and brutality en route. At the hotel, the two men forced her to have intercourse with the bellboy. (R. 30-31.) They also asked the bellboy to get some business for her. She was sent to three rooms. In the first two rooms she was too frightened to obtain any money, but upon further raging by petitioner, she obtained five dollars in the third room, which she turned over to petitioner. (R. 31-33.)

Scott worked in the hotel for three days, petitioner coming in every two hours or so, taking the money, and threatening her. Then he took her to Odessa, Texas, informing her that he was going to marry her, "I will make it legal, so you can never get away. * * * You will be committing bigamy." McIntosh remarked, at the same time, "Well, how many times has this been for you, Rising?" (R. 33-34, 62, 80.) The three then drove to Lovington, New Mexico, where Scott signed marriage instruments with her maiden name pursuant to petitioner's orders and an ostensible marriage ceremony was enacted. (R. 34-35, 63-68.)

On the next day, petitioner drove Scott to a hotel in Odessa and instructed her to go in and talk to the bellboy about going to work as a prostitute (R. 35). Petitioner then drove Scott to Dallas where they registered at a motel. Petitioner offered the bellboy intercourse with Scott

and asked him to obtain business for her. During the stay in Dallas, petitioner traded his Cadillac for a Pontiac, thereby obtaining some money. A few nights later, petitioner induced the apparently frightened bellboy to have intercourse with Scott in payment for whiskey. (R. 35-37, 60-61.) From Dallas, the two returned to Odessa and then went to Lubbock, Texas, where some marihuana was picked up. Scott left petitioner at Richmond, Virginia, on August 28. (R. 37-38.)

In substantiation of Scott's testimony, one bellboy, Davis, of the Dallas motel, testified that petitioner had asked him, in Scott's presence, to refer to him any men desiring girls (R. 83-84), and a second bellboy at the motel, Livingston, testified that he had been similarly solicited by petitioner and that he had been urged three times by petitioner to accept payment for whisky by sexual intercourse with Scott (R. 88-91).

ARGUMENT

1. Petitioner contends that the trial judge should have extended him the privilege of a husband against testimony of a wife and excluded all testimony of the witness Scott relating to matters prior to the ostensible marriage ceremony in August 1951, and that upon such exclusion the evidence of petitioner's guilt would have been insufficient (Pet. 3-5, 13-16). But the evidence is uncontradicted that the witness Gwen Scott re-

married Jack Scott on January 21, 1951, that they were never thereafter divorced (*supra*, pp. 3-6), and that when petitioner later forced the witness to go through the forms of a marriage ceremony in August 1951 he did so in full knowledge that no marriage was being effected, but only a bigamous ceremony.[4] It is undisputed law that the privilege against testimony by one's wife does not apply to testimony by a woman with whom a second, bigamous relationship has been entered into. *Miles* v. *United States*, 103 U.S. 304, 313; 8 Wigmore, *Evidence* (3d ed., 1940) § 2231.

Moreover, under the uniform holding of the United States Courts of Appeals and other authorities, even if the witness here had actually been petitioner's wife the offense of transporting her for purposes of prostitution would have constituted such injury to her as would require her testimony to be admitted within the long-established exception to the privilege in cases of injury to the wife. See recent reviews of authorities in *United States* v. *Mitchell*, 137 F. 2d 1006, 1008-1009 (C.A. 2), reaffirmed, 138 F. 2d 831, certiorari denied, 321 U.S. 794; *Shores* v. *United States*, 174 F. 2d 838, 839-841 (C.A. 8),

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[4] Obviously, the subsisting, earlier marriage could not be considered to be in dispute merely upon the innuendo of petitioner's counsel, and without adducing of evidence other than hearsay evidence of petitioner's and Scott's statements in a sham marriage ceremony that Scott was single (R. 64-65).

overruling the one earlier federal case possibly *contra, Johnson* v. *United States,* 221 Fed. 250 (C.A. 8); *United States* v. *Graham,* 87 F. Supp. 237, 238-241 (E.D. Mich.); 8 Wigmore, *Evidence* (3d ed., 1940) § 2239, n. 13.

2. Petitioner complains that the judge's charge failed to define the offense for the jury (Pet. 3-5, 13, 16-18). However, the judge read the indictment (R. 98-99) and summarized the facts which the jury must find to establish guilt (R. 100). In addition he said (R. 100):

> In that connection I give you a requested charge by the defendant. We have substantially covered it, but we want to give it in his language.
>
> Gentlemen of the jury, I charge you, as part of the law in this case, that even though you have found, beyond a reasonable doubt, that the defendant induced and caused the said Gwen Lynn Scott to engage in prostitution in Dallas, Texas, and other places in Texas, yet, unless you further find and believe beyond a reasonable doubt, that the defendant transported the said Gwen Lynn Scott from Los Angeles, California to Dallas for the sole purpose of prostitution of Gwen Lynn Scott, you will acquit the defendant, or, if you have a reasonable doubt thereof, you will find the defendant not guilty.

This language and the remainder of the charge clearly enlightened the jury and went well beyond the minimum required to safeguard petitioner's rights.

3. Petitioner's various objections to rulings on the admissibility of evidence (Pet. 18-22) are without merit.

a. He complains (Pet. 18-19, 22) that Gwen Scott's remarriage to Scott was improperly proved by the admission of a minister's certificate of the marriage and a certificate of the Clerk of the District Court of the State of Iowa that the return of the marriage certificate was of record (R. 76-80), in that the records were not properly authenticated under 28 U.S.C. 1739. However, the certification by the clerk of the return of the record entry, which included a certification of the marriage certificate (R. 79), was in accord with Rule 44(a), F.R. Civ. P., which provides:

> An official record or an entry therein, when admissible for any purpose, may be evidenced * * * by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States * * * the certificate may be made * * * by any public officer having a seal of office and having official

> duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. * * *

28 U.S.C. 1739, cited by petitioner (Pet. 22), does not establish an exclusive method of proving records. As stated in the Notes of the Advisory Committee on Rules:

> [Rule 27, F.R. Crim. P.] incorporates by reference Rule 44 of the Federal Rules of Civil Procedure * * *. The rule does not supersede statutes regulating modes of proof in respect to specific official records. In such cases *parties have the option of following the general rule or the pertinent statute.* [Italics supplied.]

b. Petitioner contends that it was improper to admit the evidence that petitioner gave Scott marihuana at the outset in Illinois and took pictures of her in the nude (Pet. 19) and that petitioner forced Scott to have intercourse with a bellboy before the transportation (Pet. 19-21). But, as pointed out by the trial judge, these acts disclosed petitioner's system of operation (*supra,* pp. 3-5). While the judge safeguarded petitioner's rights by specifically warning the jury that petitioner was not being tried for dispensing marihuana (*supra,* p. 3, fn. 1), he was clearly correct in noting that the fact as to the marihuana would disclose Scott's condition at the time when

petitioner secured his hold on her by obtaining the pictures in the nude, only a month or two, at most, prior to the transportation for purposes of prostitution (*supra*, pp. 3-4).

4. Equally without merit are petitioner's claims that he was denied a fair trial by reason of the remarks of the trial judge (Pet. 22-25).

At the opening of the trial, the United States Attorney stated that there would be obscene testimony in the case and suggested that the court might wish to warn the spectators (R. 12). Counsel for petitioner objected, saying:

> I wish to take an exception to counsel's remark. It is glamorizing his lawsuit, and we except to counsel's remark and ask the Court to tell the jury not to consider it for any purpose.

The Court then said:

> All right. Gentlemen of the jury, you will not consider that comment in any way against the defendant. Cases of this character usually sound like something without the fragrance of roses.
>
> All women in the Courtroom may be excused unless they especially want to hear something of this character.

Petitioner took no exception to the foregoing statement of the judge to the jury. His present

claim that it constituted prejudicial error is obviously specious, particularly in the light of the actual testimony in the case.

In ruling on evidence, the judge pointed out to counsel that the offense of transporting for purposes of prostitution would be made out irrespective of the prostitute's former character, since the offense was against society and not the person (R. 43, 45, 57). This correct statement of the law was certainly not, as petitioner claims (Pet. 24) a prejudicial indication of opinion. Certainly there is no basis for the claim that petitioner was prejudiced when the judge sustained his objection to a question, as to petitioner's prior reputation in Dallas (R. 85, Pet. 24). As for the judge's comment that "Sufficient unto the day is the evil thereof" (R. 92, Pet. 25), it was made in connection with an attempt by petitioner's counsel to inject an issue of rape into his cross-examination of a bellboy. (R. 91-92.)

A sufficient answer to all of petitioner's claims is the charge of the court as follows (R. 99-100):

> If you, at any time, have formed any thought, or any opinion, as to what the Court thinks about this case, from any ruling, or from any portion of this charge, or anything that transpired in the trial, that the Court has an opinion as to what should be done in the case, don't be influenced by that thought, lay it aside. Your responsibility in the case,

the jury's duty is to find out the truth, the Court's duty is to tell the jury the law, and to see that the case is tried according to law.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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